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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR:

(a) TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT;

(b) STATUS OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT;

(c) QUESTION OF ENFORCED OR INVOLUNTARY DISAPPEARANCES;

(d) QUESTION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers

Report of the Special Rapporteur, Mr. Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 1994/41

GE.95-10600 (E)

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Introduction

A. The mandate

1. At its fiftieth session, in resolution 1994/41 of 4 March 1994, the Commission on Human Rights, noting both the increasing frequency of attacks on judges, lawyers and court officials and the link which existed between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur whose mandate would consist of the following tasks: (a) to inquire into any substantial allegations transmitted to him and to report his conclusions thereon; (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials, but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

2. In its decision 1994/251 of 22 July 1994, the Economic and Social Council approved the above requests.

3. In resolution 1994/41 also, the Commission on Human Rights urged all Governments to assist the Special Rapporteur in the performance of his mandate and to transmit to him all the information requested.

4. By letter dated 21 April 1994, the Chairman of the Commission on Human Rights, following consultations with the Bureau, appointed Dato' Param Cumaraswamy (Malaysia) as Special Rapporteur.

5. In this first report, the Special Rapporteur presents his reflections upon, and understanding of, the mandate in general and the standards to which he will refer in carrying out his mandate. Thereafter, the Special Rapporteur describes the methods of work he will employ in fulfilment of his functions. In the hope of realizing the objectives of his mandate, the Special Rapporteur then comments on the resources necessary for the effective implementation of his mandate. Finally, the Special Rapporteur sets out some conclusions and makes some initial recommendations relating to his mandate and its effective implementation.

B. Activities of the Special Rapporteur

6. The first act of the Special Rapporteur (acting in accordance with paragraph 6 of Commission resolution 1993/94 (A)) was his participation in the meeting of special rapporteurs/representatives/experts and chairmen of working groups of the special procedures of the Commission on Human Rights which was held at Geneva from 30 May to 1 June 1994, in accordance with part II, paragraph 95, of the Vienna Declaration and Programme of Action. As reflected in the report of the meeting (E/CN.4/1995/5, annex), the meeting provided the Special Rapporteur with a welcome opportunity to meet with most of the other special rapporteurs and independent experts engaged in the protection of human rights under procedures of the Commission and to consider a variety of issues

of mutual concern. While at the Palais des Nations, the Special Rapporteur took advantage of the occasion to meet with staff of the Centre for Human Rights.

7. The Special Rapporteur visited Geneva for a second time from 11 to 15 September 1994 in order to hold consultations with the Centre, including meetings with the High Commissioner for Human Rights and the Assistant-Secretary-General for Human Rights, concerning substantive and practical matters relating to implementation of the mandate. The Special Rapporteur also took the opportunity to meet representatives of some non-governmental organizations with a special interest in the mandate.

8. While at Geneva in September 1994, the Special Rapporteur undertook to establish initial direct contacts with all States Members of the United Nations, United Nations specialized agencies and bodies having a possible interest in his mandate, various intergovernmental organizations of both a universal and a regional nature, and all non-governmental organizations having a possible interest in his mandate. As a result, over 1,600 letters were sent over the subsequent months to Governments, heads of the judiciary, bar associations and a wide variety of intergovernmental and non-governmental organizations. These letters were intended not only to introduce the Special Rapporteur and his mandate to the various addressees, but also to obtain both general and specific information relating to the implementation of the mandate. Replies are being received, of which the Special Rapporteur is taking account. At the same time, the Special Rapporteur is continuing to compile lists of institutions and persons throughout the world with whom he has yet to establish direct contacts, with a view to achieving the greatest awareness concerning the existence of his mandate and the standards pertaining to the independence of the judiciary and the legal profession which are required in themselves under international law and are also necessary to achieve respect for human rights in general.

9. As it is of special importance for the Special Rapporteur to establish direct contact with national judicial institutions and professional associations of jurists, he has established such contact with most chief justices and bar associations throughout the world. This process is continuing (for example, the Special Rapporteur is soon to address himself to a number of national associations of judges) and it is hoped that close relationships will be formed between these institutions and the Special Rapporteur.

10. The Special Rapporteur is also endeavouring to establish contacts with parliamentary bodies throughout the world with a view to securing their fullest understanding of, and their active engagement in maintaining through legislative means, the independence of the judiciary and the legal profession. Positive contacts have already been established with international associations of parliaments and parliamentarians, and it is expected that the Special Rapporteur will build upon these contacts at the international, regional and national levels.

11. Pursuant to paragraph 3 (a) of Commission resolution 1994/41, the Special Rapporteur has enquired into several allegations of attacks on the judiciary. Some of his inquiries are ongoing, while others appear to have reached their

conclusion. However, in so far as the Special Rapporteur only really began his work subsequent to the Economic and Social Council's approval of his mandate near the end of July 1994, he prefers not to report at this time on any cases with which he has been concerned. It is his intention to report in detail on these matters, and on other substantive aspects of his mandate, in his report to the Commission at its fifty-second session in 1996.

12. Pursuant to paragraph 3 (b) of Commission resolution 1994/41, the Special Rapporteur is seeking to catalogue progress achieved in protecting and enhancing judicial independence and impartiality and the independence of the legal profession, partly through replies he is receiving as a result of his initial contacts with Governments and national judicial institutions and partly through studying selected country situations. In terms of making "concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned", as provided for in paragraph 3 (b) of resolution 1994/41, the Special Rapporteur is paying special attention to countries undergoing transition to democracy since their needs are generally considerable and since positive steps early in their transition will contribute significantly to achievement of the rule of law, respect for human rights and peace and prosperity. In this connection, the Special Rapporteur hopes to work closely with the advisory services programme of the Centre for Human Rights in matters concerning his mandate. To this end, the Special Rapporteur would welcome: (i) being apprised on a regular basis of present and planned involvement of the Centre in the provision of advisory services and technical assistance in the area of judicial independence and impartiality and the independence of the legal profession; and (ii) being consulted on specific services and assistance designed to secure judicial independence and impartiality and the independence of the legal profession.

13. Turning to paragraph 3 (c) of Commission resolution 1994/41, the Special Rapporteur has studied the previous important reports on the subject of judicial independence and impartiality and the independence of the legal profession submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. These reports amply illustrate that several questions of principle require further study and, ultimately, the elaboration of clear standards. While these questions are to be found mainly on the margin of the issues of independence, they nevertheless pose significant obstacles to the protection of human rights in general, for example in states of emergency. So far, the Special Rapporteur has merely taken note of a number of these questions, and it his intention to expound upon certain of them in the course of fulfilling his mandate.

14. With regard to a general matter, the Special Rapporteur wishes to comment upon his decision to choose an appropriate short title for his mandate. Upon taking up his mandate, the Special Rapporteur was referred to as the "Special Rapporteur on the independence and impartiality of the judiciary". However, he soon came to realize that this short title did not convey the breadth of his mandate, which is not well known even among those persons and institutions who hold, or should hold, an interest. For example, as was the case for the independent experts of the Sub-Commission on Prevention of Discrimination and Protection of Minorities who dealt with the subject, the early experience of the Special Rapporteur revealed that lawyers and bar associations are

inadequately aware of the mandate and even their rights and protections under international law. For these persons, the term "judiciary" does not immediately or sufficiently indicate the inclusion of lawyers and other court officers. Consequently, the Special Rapporteur has chosen to begin using the new short title "Special Rapporteur on the independence of judges and lawyers" as of the beginning of 1995, with the understanding that the term "independence", while technically different from "impartiality", tends to imply impartiality. However, the Special Rapporteur does not mean to give the impression that he will not be concerned with structural questions relating to the institutions of the judiciary and the legal profession, including bar associations. Nor should the short title of the Special Rapporteur be interpreted to mean that he will not concern himself with issues affecting the independence and impartiality of assessors. Similarly, the Special Rapporteur will be attentive to interferences with the independence and impartiality of jurors.

I. CONSIDERATIONS ON THE MANDATE

A. Introduction

15. The object of this chapter is to situate the mandate of the Special Rapporteur in the context of the considerable work which has been accomplished so far in elaborating international standards and seeking their full respect. To this end, the Special Rapporteur will briefly recount the historical antecedents of his mandate within the United Nations, describe the legal framework in which his work will be carried out, and identify some of the important questions of principle which he intends to address over the next two years. By doing so, the Special Rapporteur hopes that this report will provide continuity with the work which has come before and will contribute to the clarity and coherency of the work which he intends to carry out in fulfilment of his mandate.

B. Historical background of the mandate

16. The independence and impartiality of judges, lawyers and other actors within the judicial branch of government are considered essential elements in safeguarding human rights. This understanding has been incorporated into various international instruments for the protection of human rights. However, some of the practical difficulties experienced throughout the world in relation to the need for measures and conditions regarded as essential to ensure and secure the independence and impartiality of the judiciary inspired the Sub-Commission on Prevention of Discrimination and Protection of Minorities to request, in its resolution 5 E (XXXI) of 13 September 1978, the Secretary-General to prepare a preliminary study on the matter and to report to the Sub-Commission at its thirty-second session in 1979. Taking into account earlier work of the Sub-Commission related to the administration of justice, the Secretary-General accordingly sought relevant information from the Governments of member States and compiled the replies received in his subsequent report of 11 July 1979 (E/CN.4/Sub.2/428).

17. Following its consideration in 1979 of the report of the Secretary-General, the Sub-Commission sought and received the authorization of the Economic and Social Council (decision 1980/124 of 2 May 1980) to entrust

Mr. L.M. Singhvi with the preparation of a report on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers. Mr. Singhvi accordingly submitted a preliminary report on the subject in 1980 (E/CN.4/Sub.2/L.731) and progress reports in 1981 (E/CN.4/Sub.2/481 and Add.1), 1982 (E/CN.4/Sub.2/1982/23) and 1983 (E/CN.4/Sub.2/1983/16).

18. Based upon Mr. Singhvi's successive reports, the Sub-Commission adopted resolution 1984/11, in which it requested him to submit his final report to the Sub-Commission at its thirty-eighth session in 1985, and decided to consider it at that session with a view to the elaboration of a draft body of principles. This decision of the Sub-Commission, and the subsequent work of Mr. Singhvi, served as catalysts for activities by interested persons and non-governmental organizations throughout the world which reinforced and specifically contributed to the elaboration of a draft body of principles. In his final report (E/CN.4/Sub.2/1985/18 and Add.1-6), Mr. Singhvi submitted an initial draft declaration on the independence of justice (the "Singhvi draft declaration"). In addition to his own draft, Mr. Singhvi annexed to his report the Draft principles on the independence of the legal profession (formulated by a meeting of lawyers from throughout the world, held at Noto, Italy, from 10 to 14 May 1982, in which the Special Rapporteur had the honour to participate and contribute) and the Universal Declaration on the Independence of Justice (adopted by a meeting of eminent jurists in Montreal, Canada, on 10 June 1983).

19. Pursuant to Sub-Commission decision 1985/107, Mr. Singhvi's final report was circulated to the members of the Sub-Commission for their comments, upon which Mr. Singhvi was requested to report again to the Sub-Commission at its thirty-ninth session. A compilation of the comments made by members of the Sub-Commission is contained in document E/CN.4/Sub.2/1987/17.

20. Taking into consideration the comments he had received from members of the Sub-Commission and also from Member States (following circulation of the draft pursuant to Sub-Commission resolution 1987/23), Mr. Singhvi submitted a report reflecting these comments and suggestions on the draft declaration (E/CN.4/Sub.2/1988/20), together with a revised version of the draft declaration (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1), to the Sub-Commission at its fortieth session. By this time, the international community had already elaborated clear standards regarding specifically the judiciary: the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, meeting at Milan from 26 August to 6 September 1985, had adopted the Basic Principles on the Independence of the Judiciary (A/CONF.121/22, chap. I, sect. D.2), as endorsed by the United Nations General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. At the same time, Draft Basic Principles on the Role of Lawyers were being considered under the auspices of the United Nations on the basis of a working paper prepared by the secretariat of the United Nations Office at Vienna - apparently without reference to the draft declaration prepared by Mr. Singhvi (see E/CN.4/Sub.2/1988/20, para. 53). These closely related activities of the United Nations contributed to Mr. Singhvi's revised draft declaration.

21. In its resolution 1988/25, the Sub-Commission expressed its appreciation and thanks to the Special Rapporteur, Mr. Singhvi, for the enduring and valuable contribution he had made to the legal doctrine relating to the independence of justice, which was one of the primary prerequisites for the promotion and protection of human rights, and decided to refer the Singhvi draft declaration, under the title "Draft declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers", to the Commission on Human Rights for further consideration. It also decided to consider the draft declaration under a separate item of the agenda at its forty-first session.

22. The Commission on Human Rights, at its forty-fifth session, in resolution 1989/32, invited Governments to take into account the principles set forth in the Singhvi draft declaration in implementing the Basic Principles on the Independence of the Judiciary. The Commission also welcomed the decision of the Sub-Commission to consider an agenda item on the draft declaration at its forty-first session and requested the Sub-Commission, under the same agenda item, to consider effective means of monitoring the implementation of the Basic Principles on the Independence of the Judiciary and the protection of practising lawyers.

23. In its resolution 1989/22, the Sub-Commission, at its forty-first session, responded to the above request of the Commission by inviting Mr. Louis Joinet to prepare a working paper on means of monitoring implementation of the relevant standards. The Commission on Human Rights, in its resolution 1990/33, endorsed Sub-Commission resolution 1989/22 and recommended that the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders consider as a matter of priority the draft basic principles on the role of lawyers elaborated by the Committee on Crime Prevention and Control, with a view to their adoption. Meeting at Havana from 27 August to 7 September 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders did in fact adopt the aforementioned principles, together with Guidelines on the Role of Prosecutors.

24. In accordance with his mandate, Mr. Joinet submitted a working paper to the Sub-Commission at its forty-second session (E/CN.4/Sub.2/1990/35) in which he recounted the then current United Nations standard-setting and reporting activities, categorized violations of international norms relative to judicial independence and impartiality and the independence of the legal profession, surveyed positive experiences in protecting the independence of judges and lawyers, and drew some conclusions. In the same working paper, Mr. Joinet recommended that the Sub-Commission request one of its members to prepare a report which would (a) make a system-wide analysis of the advisory service and technical assistance programmes of the United Nations as regards the subject and (b) bring to the attention of the Sub-Commission cases of legislative and practical measures serving to strengthen judicial independence and impartiality and the independence of the legal profession or, on the contrary, cases which constituted violations of these norms (E/CN.4/Sub.2/1990/35, para. 76).

25. After considering the working paper submitted by Mr. Joinet, the Sub-Commission decided, in its resolution 1990/23, to entrust Mr. Joinet with the preparation of such a report as he had recommended. That decision was endorsed by the Commission in its resolution 1991/39.

26. In the meantime, the standard-setting activities had continued in relation to the roles of lawyers and prosecutors: both the Basic Principles on the Role of Lawyers and Guidelines on the Role of Prosecutors were adopted at the Eighth United Nations Congress on the Prevention and Treatment of Offenders, held at Havana from 27 August to 7 September 1990; the two instruments were subsequently welcomed by the General Assembly in its resolutions 45/121 of 14 December 1990 and 45/166 of 18 December 1990.

27. The following year, Mr. Joinet submitted a comprehensive report to the Sub-Commission at its forty-third session (E/CN.4/Sub.2/1991/30). In this report, Mr. Joinet surveyed the advisory services and technical assistance rendered by the United Nations in the field of human rights and other related fields; surveyed measures and practices which had strengthened, or to the contrary weakened, the safeguards of independence and protection; drew conclusions and made practical recommendations. While comprehensive in the matters addressed, the report was not, Mr. Joinet admitted, exhaustive. In relation to measures and practices which had served to strengthen or weaken the independence of the judiciary and the protection of lawyers, he had "intended merely to illustrate, from the standpoint of method, what a report on the subject might cover in relation to the international standards" (E/CN.4/Sub.2/1991/30, para. 301). In fact, in his report Mr. Joinet had given priority to the matter of advisory services and technical assistance and addressed only "the major obstacles - especially physical pressure", partly because "the information received or collected ... [was] too abundant to be dealt with in a single report" (para. 302). Consequently, Mr. Joinet made detailed recommendations with respect to advisory services and technical assistance, but, with regard to measures and practices which had served to strengthen or weaken the independence of the judiciary and the protection of lawyers, he recommended renewal of that part of his mandate to enable him to provide the Sub-Commission with the fullest possible information (para. 312).

28. In resolution 1991/35 of 29 August 1991, the Sub-Commission decided to entrust Mr. Joinet with the preparation of another report to bring to its attention information on practices and measures which had served to strengthen or to weaken the independence of the judiciary and the legal profession in accordance with United Nations standards. In its resolution 1992/33, the Commission on Human Rights endorsed the Sub-Commission's decision.

29. At its forty-fourth session, the Sub-Commission considered the further report of Mr. Joinet (E/CN.4/Sub.2/1992/25 and Add.1), in which he reported upon positive measures and practices aimed at strengthening the safeguards of independence and protection and cited cases of measures and practices which had served to weaken these safeguards. He divided those cases into those measures and practices which had: constituted "pressure" on judges and lawyers; been implemented during states of emergency and in the administration of military justice; weakened the application of statutory safeguards and the tenure of judges; weakened the application of the safeguards relating to

access to the assistance of a lawyer or to the practice of the profession; and weakened the application of the safeguards relating to the freedoms of association and expression of lawyers. After considering his report, the Sub-Commission decided, in resolution 1992/38 of 28 August 1992, to entrust Mr. Joinet with the preparation of a final report which, in addition to bringing to the attention of the Sub-Commission further information on practices and measures which had served to strengthen or to weaken the independence of the judiciary and the protection of practising lawyers in accordance with United Nations standards, would enable him: to make specific recommendations regarding the independence of the judiciary and the protection of practising lawyers to be taken into account in the United Nations advisory services and technical assistance programmes (following upon his earlier recommendations); to examine ways of enhancing cooperation and avoiding overlapping and duplication in the work of the Commission on Crime Prevention and Criminal Justice and that of the Sub-Commission; and to elaborate upon the recommendations made in his 1992 report. Sub-Commission resolution 1992/38 was subsequently endorsed by the Commission on Human Rights at its forty-ninth session in resolution 1993/44 of 5 March 1993.

30. In his final report to the Sub-Commission (E/CN.4/Sub.2/1993/25), in which he reported on what he termed "positive and negative measures and practices concerning guarantees of independence, impartiality and protection", Mr. Joinet provided: an update on the relevant activities under the United Nations programme of advisory services and technical assistance; a summary of the development of standards at both the universal and regional levels; and an update of his survey of positive and negative measures and practices by Governments within their own domestic jurisdiction. In relation to "negative measures and practices", Mr. Joinet addressed both de facto violations and violations in the operation of the law, under the following headings: "violence, physical threats and harassment"; "actions undermining the courts' need for objective and impartial information"; "declaration of states of emergency or establishment of courts of special jurisdiction"; "encroachments on professional or jurisdictional status"; and "violations of fundamental freedoms". Mr. Joinet concluded his report with suggestions for the reinforcement of cooperation between the United Nations human rights programme and the United Nations crime prevention and criminal justice programme and a recommendation for the establishment of a monitoring mechanism. Specifically, he recommended the creation of a special procedure capable of: examining what he characterized as "the still too numerous violations perpetrated today, only the most symptomatic of which have been described in the present report" (E/CN.4/Sub.2/1993/25, chap. II, para. 10); "eliciting the cooperation of Governments" (E/CN.4/Sub.2/1993/25, chap. II, para. 11) with a view to addressing relevant questions or situations; remedying "the insufficient involvement of judges' and lawyers' professional organizations in a question which is nevertheless of direct concern to them" (ibid.) - and for the broader interests of society at large, the Special Rapporteur would add; and "prospecting for new work areas whose importance and urgency, already considerable, will probably attain priority status: justice and the media, justice and reasons of state, justice and emergency situations, justice and anti-terrorism measures, etc." (ibid.).

31. On the basis of the various studies and reports prepared under Sub-Commission mandates during more than a decade, and taking into consideration especially the final report of Mr. Joinet (E/CN.4/Sub.2/1993/25 and Add.1), the Sub-Commission recommended, in its resolution 1993/39 of 26 August 1993, the creation of "a monitoring mechanism to follow up the question of the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officers, and the nature of problems liable to attack this independence and impartiality". The Commission on Human Rights, in its resolution 1994/41 of 4 March 1994, endorsed the recommendation of the Sub-Commission, and thereupon requested the Chairman of the Commission to appoint a special rapporteur. The substance of Commission resolution 1994/41, as approved by Economic and Social Council decision 1994/251, is recounted in paragraphs 1 to 3 above.

C. The legal framework

32. The Special Rapporteur observes that the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law.

33. The Special Rapporteur will not here embark upon a treatise intended to establish the basis and content of applicable law. Indeed, in each case, the specific combination of applicable standards will be a function of the conventional obligations binding upon the concerned state in conjunction with the equally binding customary obligations and general principles of law. However, in this section of his report, the Special Rapporteur wishes to clarify the rudimentary elements he will refer to in assessing compliance by a State with its obligations.

34. In relation to the underlying concepts of judicial independence and impartiality, which the Special Rapporteur asserts are "general principles of law recognized by civilized nations" in the sense of Article 38 (1) (c) of the Statute of the International Court of Justice, the Special Rapporteur can do no better than to quote the following passages of Mr. Singhvi's lucid final report to the Sub-Commission in 1985 (E/CN.4/Sub.2/1985/18 and Add.1-6):

> "75. Historical analysis and contemporary profiles of the judicial functions and the machinery of justice shows the worldwide recognition of the distinctive role of the judiciary. The principles of impartiality and independence are the hallmarks of the rationale and the legitimacy of the judicial function in every State. The concepts of the impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions. These are not mere vague nebulous ideas but fairly precise concepts in municipal and international law. Their absence leads to a denial of justice and makes the credibility of the judicial process dubious. It needs to be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake.

> "76. Judges must be impartial and independent and free from any restrictions, inducements, pressures, threats or interference, direct or indirect, and they should have the qualities of conscientiousness, equipoise, courage, objectivity, understanding, humanity and learning, because those are the prerequisites of a fair trial and credible and reliable adjudication ..."
>
> "79. The concept of impartiality is in a sense distinct from the concept of independence. Impartiality implies freedom from bias, prejudice and partisanship; it means not favouring one more than another; it connotes objectivity and an absence of affection or ill-will. To be impartial as a judge is to hold the scales even and to adjudicate without fear or favour in order to do right ..."
>
> "81. ... The duties of a juror and an assessor and those of a lawyer are quite different but their independence equally implies freedom from interference by the Executive or Legislative or even by the judiciary as well as by others in the fearless and conscientious discharge of their duties in the exercise of their functions ... Jurors and assessors, like judges, are required to be impartial as well as independent. A lawyer, however, is not expected to be impartial in the manner of a judge, juror or assessor, but he has to be free from external pressures and interference. His duty is to represent his clients and their cases, and to defend their rights and legitimate interests, and in the performance of that duty, he has to be independent in order that litigants may have trust and confidence in lawyers representing them and lawyers as a class may have the capacity to withstand pressure and interference."

35. Mr. Singhvi went on in his report to demonstrate that the principles of judicial independence and impartiality are reflected in the legal systems of the world by constitutional and legislative means supported by an overwhelming practice. As such, Mr. Singhvi was moved to observe that "there is in fact a coherent world profile of judicial independence and it is not merely a matter of ritual verbiage" (E/CN.4/Sub.2/1985/18/Add.1, para. 104). The Special Rapporteur fully shares the observation of Mr. Singhvi. Moreover, the Special Rapporteur is of the opinion that the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore, an international custom in the sense of Article 38 (1) (b) of the Statute of the International Court of Justice.

36. While the basic obligations and their essential elements may be rooted in international custom and the general principles of law recognized by civilized nations, the specificities of these obligations have become the subject of some articulation in various international instruments at both the universal and regional levels. Although the Special Rapporteur has no authority to supervise compliance by States with obligations arising at the regional level, he observes that several of these instruments reiterate and reinforce universal obligations. At the universal level, the Special Rapporteur draws particular attention to the provisions of the 1948 Universal Declaration of Human Rights, the 1985 Basic Principles on the Independence of the Judiciary, the 1990 Basic Principles on the Role of Lawyers, and the 1990 Guidelines on

the Role of Prosecutors. It is to be noted in regard to the aforementioned instruments that their texts were elaborated by United Nations bodies and received full endorsement by the General Assembly.

37. With regard to conventional obligations, the Special Rapporteur draws attention first and foremost to the obligations emanating from the Charter of the United Nations. Specifically, the Charter refers in its Preamble, in Article 1 (3) and Article 55 (c), to the imperatives of universal respect for human rights. The Preamble also declares the determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The Special Rapporteur observes in this relation that the overall conception of "justice" embodied in the Charter and the work of the United Nations incorporates respect for human rights and is conditioned on judicial independence and impartiality as such and for the safeguard of other human rights.

38. The Special Rapporteur observes that the further specification of the conventional obligations of the Charter entailed the elaboration of the Universal Declaration of Human Rights and subsequent instruments for the international protection of human rights. As such, at least those articles of the Universal Declaration of Human Rights which are intrinsic to respect for human rights in general may be said to proceed from the conventional undertaking of States Members of the United Nations as embodied in the Charter. The Special Rapporteur holds this to be true of articles 7, 8, 10 and 11 of the Universal Declaration of Human Rights, which provide as follows:

"Article 7

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

"Article 8

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

"Article 10

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

"Article 11

"1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

"2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

39. The Special Rapporteur observes that whereas the requirements of independent and impartial justice are explicit in article 10 of the Universal Declaration, they are clearly implied in articles 7, 8 and 11. The Special Rapporteur also observes that this understanding has been upheld and repeated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights and the General Assembly by way of consistent preambular references in virtually every resolution adopted by these bodies on the subject in question.

40. Turning to more specific conventional obligations, the Special Rapporteur refers to articles 2, 14 and 26 of the 1966 International Covenant on Civil and Political Rights, which provide as follows:

"Article 2

"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

"2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

"3. Each State Party to the present Covenant undertakes:

"(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

"(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

"(c) To ensure that the competent authorities shall enforce such remedies when granted."

"Article 14

"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

"2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

"3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

"(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

"(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

"(c) To be tried without undue delay;

"(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

"(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

"(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

"(g) Not to be compelled to testify against himself or to confess guilt.

"4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

"5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

"6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

"7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

"Article 26

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

41. The Special Rapporteur observes that whereas the requirements of independent and impartial justice are explicit in article 14 quoted above, they are clearly implied in articles 2 and 26. The Special Rapporteur also observes that this understanding has been upheld and repeated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights and the General Assembly by way of consistent preambular references in virtually every resolution adopted by these bodies on the subject in question.

42. The Special Rapporteur observes that the requirements of an independent and impartial judiciary, and independent lawyers, which are necessary for the implementation of articles 2, 14 and 26 of the International Covenant on Civil and Political Rights, are also necessary for the effective realization and enjoyment of most other rights and freedoms, especially with regard to those provisions which proscribe arbitrary acts and those provisions which prescribe judicial supervision. Articles 6.1, 6.2 and 9 of the Covenant are particularly relevant in this relation:

"Article 6

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

"2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not

contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

"Article 9

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

"2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

"3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

"4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

"5. Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation."

43. In interpreting the full implications of the provisions of the International Covenant on Civil and Political Rights (and those of the Universal Declaration of Human Rights) requiring or relating to judicial supervision, Mr. Singhvi observed that, in the elaboration of the instruments, "the concepts of independence and impartiality were not analysed or elucidated. These broad concepts were taken to be axiomatic and did not engender any controversy" (E/CN.4/Sub.2/1985/18, para. 28).

44. With respect to more specific interpretation, the Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, and acting pursuant to article 40.4, stated in its General Comment 13 of 1984 that the notion of "a competent, independent and impartial tribunal established by law", as stipulated in article 14.1 of the Covenant, raises matters regarding "the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative" (HRI/GEN/1, General Comment 13, para. 3).

45. In the elaboration of its own jurisprudence, the Human Rights Committee, as expressed through its views upon individual communications received

pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights, has stated in relation to article 14.1 that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception" (Communication No. 263/1987, González del Río v. Peru, Decision of 20 November 1992, CCPR/C/46/D/263/1987, para. 5.2). More specifically, the Human Rights Committee has stated:

> "'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14." (Communication No. 387/1989, Karttunen v. Finland, Decision of 17 November 1992, CCPR/C/46/D/387/1989, para. 7.2)

46. Turning to other conventional obligations in the field of human rights which require judicial independence and impartiality, the Special Rapporteur refers to: articles 5.a and 6 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; articles 2 (c), 15.1 and 15.2 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women; article 2.1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and articles 9.1 and 12.2 of the 1989 Convention on the Rights of the Child. The Special Rapporteur considers that the requirements of independent and impartial justice are implicit in, and are in fact or very closely related to the purpose of, the aforementioned provisions, which read as follows:

"International Convention on the Elimination of All Forms of Racial Discrimination

"Article 5

"...

"(a) The right to equal treatment before the tribunals and all other organs administering justice;

"..."

"Article 6

"States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

"Convention on the Elimination of All Forms of Discrimination against Women

"Article 2

"...

"(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;"

"Article 15

"1. States Parties shall accord to women equality with men before the law.

"2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."

"Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

"Article 2

"1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

"Convention on the Rights of the Child

"Article 9

"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. ..."

"Article 12

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

"2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

47. Although the supervisory bodies established under the above-mentioned Conventions have not so far chosen to pronounce themselves, through such general recommendations as they are entitled to issue, on the implicit requirements of judicial independence and impartiality, the Special Rapporteur observes that at least the jurisprudence of the Committee on the Elimination of Racial Discrimination has confirmed the requirement of impartiality with respect to article 5 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (see Communication No. 3/1991, Narrainen v. Norway, Opinion of 24 March 1994, CERD/C/44/D/3/1991, paras. 9.1-10). The Special Rapporteur believes that any contest of the other above-cited provisions would result in similar authoritative views or opinions.

48. Of similar importance to the conventional obligations in the foundational human rights instruments referred to above are article 16 of the 1951 Convention relating to the Status of Refugees and article 16 of the 1954 Convention relating to the Status of Stateless Persons, which provide as follows:

"Convention relating to the Status of Refugees

"Article 16. - Access to courts

"1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

"2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.

"3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

"Convention relating to the Status of Stateless Persons

"Article 16. - Access to courts

"1. A stateless person shall have free access to the courts of law on the territory of all Contracting States.

"2. A stateless person shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.

"3. A stateless person shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

49. The Special Rapporteur observes that the references to "courts" in article 16 of the Convention relating to the Status of Refugees, imply the conditions of independence and impartiality. Indeed, so far as the Special Rapporteur has been able to determine, this implication appears to have been so self-evident as to have never inspired discussion in the drafting process, interpretative notes or circulars of the Division of International Protection of the Office of the United Nations High Commissioner for Refugees (UNHCR), authoritative statements by the Executive Committee of UNHCR or any other similar body, or even analyses in any subsequent academic commentaries on the Convention. The same absence of controversy or even concern appears to have characterized the drafting, analysis, implementation and academic treatment of article 16 of the Convention relating to the Status of Stateless Persons. The apparent absence of doubt most probably is attributable to the logic underlying the provisions - that the person for whom protection is aimed should have recourse to an instance which is not subject to executive or legislative dictates or interests and which is also free from bias, i.e. that the instance be independent and impartial. If this were not so, the Special Rapporteur submits that the provisions would lose their reason for being.

50. Returning to the provisions of the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors to which the Special Rapporteur has referred above and to which he attaches special importance as the most precise articulations of the standards relating to judicial independence and impartiality and to the independence of the legal profession, it is to be understood that these instruments will constitute the main references in implementation of the present mandate.

51. While the legal framework of the Special Rapporteur's mandate may be said to be a composite of various obligations arising over the years from the different sources of international law, the Special Rapporteur also attaches considerable importance to Part I, paragraph 27 of the Vienna Declaration and Programme of Action (A/CONF.157/23), unanimously adopted on 25 June 1993 by the World Conference on Human Rights, which brings together the matter in a concise fashion, declaring, in part, as follows:

"Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development ..."

52. Despite the quite developed legal content of the notions of judicial independence and impartiality, and also the broader notion of an independent legal profession, some lacunae remain on the margin of these concepts in

international law. This fact explains the existence of the third part of the Special Rapporteur's mandate, which relates to questions of principle requiring clarification, if not further elaboration and possible standard-setting.

D. Some issues of special importance

53. As noted above, the Special Rapporteur is mandated "to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers" (Commission resolution 1994/41, para. 3 (c)).

54. In studying the work of the Sub-Commission which preceded the creation of his mandate, the Special Rapporteur observes that several questions of principle have already been raised, particularly by Mr. Joinet in his reports. Specifically, Mr. Joinet suggested that the following issues might be given priority status under a monitoring mechanism such as has now been established: justice and the media, justice and reasons of State, justice and emergency situations, justice and anti-terrorism measures (E/CN.4/Sub.2/1993/25, chap. II, para. 11).

55. In fact, as the Special Rapporteur has already indicated, some issues require clarification only. For example, clarification (or perhaps, more accurately, reiteration) may be necessary in relation to the principle of the separation of powers, which is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a sine qua non for a democratic State and is, therefore, of cardinal importance for countries in transition to democracy - which heretofore have been typically characterized by precisely the absence of a separation of powers. Thus, the Special Rapporteur will emphasize the special and urgent necessity for respecting the principle of separation of powers and the requirements of judicial independence and impartiality, especially in countries in transition to democracy. He is confident that, in doing so, the valuable contribution made by independent and impartial justice to national development will also become apparent.

56. Another case where clarification may be necessary is with regard to the function of judicial review, or its equivalent, of the constitutionality or legality of executive decisions, administrative orders and legislative acts. Early in the implementation of his mandate, the Special Rapporteur has already observed a considerable misunderstanding on the part of governmental authorities and even parliamentarians. The misconception seems to be that judicial review is a matter of substituting the opinions of judges for the determinations or acts of the competent authorities within or under the executive or legislative branches of government. The often heard argument is: "How could judges, who are merely appointed, set aside the decisions of the elected representatives of the people and substitute their own decisions?" This misunderstanding tends also to cause the executive or legislative branches to seek to limit, or even suspend, the power of judicial review, i.e. to interfere with judicial independence. Of course, the function of judicial review serves only to ensure that the executive and legislative branches carry out their responsibilities according to law, and that their determinations or

acts do not exceed their accorded powers. The process of judicial review serves to check executive and legislative excesses by upholding the rule of law; it is in no sense a matter of substitution. However, because of the seemingly widespread misunderstanding of the power of judicial review (which is so vital for the protection of the rule of law), the Special Rapporteur will devote some effort to addressing the problem, especially in the context of countries undergoing transition to democracy.

57. Aside from those issues which may require some clarification, it is evident that some standards will have to be further elaborated in terms of the specificities of their application in certain contexts or situations, while other questions of principle will require the elaboration of entirely new standards in order to fill existing gaps. In relation to the former, it is to be observed that the criterion of "independence" is not always assured with respect to military courts, revolutionary tribunals, or similar special courts. In these cases, the extent of the criterion of independence is at issue and requires a clear and sufficient response in terms of application of existing standards.

58. The complexities of the modern State, together with genuine threats which manifest themselves indiscriminately against whole societies, raise questions of principle which may well require additional standards in relation to judicial independence and impartiality and to the independence of the legal profession. However, arguments invoked by the executive to restrict judicial independence on the basis of "reasons of State" (for example, national security) must be carefully scrutinized and clear limits to the restrictions must be established. The Special Rapporteur is confident that creative solutions can be found which would overcome problems of, for example, sensitive documentation which the executive might seek to withhold from the judiciary. In order to avoid what Mr. Joinet has seen to be an "excessive usage of the prerogatives conferred on governmental authorities" (E/CN.4/Sub.2/1993/25, para. 116), examination of the problem will have to be initiated.

59. Another question of considerable concern to the Special Rapporteur arises in relation to states of emergency. One commentator has observed concisely that "the emasculation of the judiciary and the harassment of defence lawyers are not uncommon in a state of emergency" (Chowdhury, Subrata Roy, Rule of Law in a State of Emergency, Pinter Publishers, London, 1989, p. 130). Indeed, decrees instituting states of emergency are often followed by mass dismissals of judges, the creation of special courts and the restriction or suspension of the judicial review function. Concern over such matters has been expressed over the years by many organizations and in many forums, for example, by the International Commission of Jurists and its Centre on the Independence of Judges and Lawyers, the International Law Association and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and there is no doubt that the matter remains in need of resolution. In this connection, the Special Rapporteur takes note of paragraph 9 of the "Guidelines for the Development of Legislation on States of Emergency" (entitled "Effects of a state of emergency on the judiciary", and which seeks to protect, inter alia, the critical function of judicial review) annexed to the fourth annual report

and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, submitted to the Sub-Commission by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37 (E/CN.4/Sub.2/1991/28).

60. The scourge of terrorism has also given rise to anti-terrorism measures which often present problems for judicial independence or the independence of the legal profession. As in the case of states of emergency, one feature of anti-terrorism measures has been the creation of special courts. In some countries, procedural requirements of the measures constitute clear interferences with the lawyer-client relationship, for example, interferences with confidentiality. Other measures, such as the increasingly broadly applied technique of hooding judges in order to protect them from reprisals, raise larger questions of due process which may have some bearing on the notions of judicial independence and impartiality. Some standard-setting may be required in this area.

61. Another source of increasing concern is the relationship between the media and the judiciary. In this era of rapidly developing communications technologies, it has become difficult at times to balance the equally important freedom of expression (and the corresponding right to information) on the one hand with the requirements of fair trial (featuring an independent and impartial judiciary) on the other hand. Certainly, judges (and/or jurors) must be protected against pressures which would implant or effect bias, or even cause the appearance of such bias, to the detriment of the rule of law in a specific case or in general. At the same time, one must be extremely careful not to restrict unnecessarily the freedom of expression. The question must be examined, a fine balance between these two competing, equally important, rights must be sought, and additional standards of protection may have to be developed in this connection.

62. In referring to the above issues, the Special Rapporteur has sought only to identify some questions of principle to which he attaches special importance. With the cooperation of interested Governments, intergovernmental organizations, non-governmental organizations and individuals, the Special Rapporteur hopes to be able to contribute constructively to the further elaboration of appropriate standards of judicial independence and impartiality and of the independence of the legal profession.

II. METHODS OF WORK

A. Introduction

63. In reviewing the work which has led up to the creation of his mandate, and as a result of his own early experience, the Special Rapporteur wishes to make the preliminary observation that his mandate applies to a wide spectrum of court officers, as its long title indicates. Accordingly, the Special Rapporteur will address issues affecting the officers of the court concerned under his mandate. However, the Special Rapporteur also takes note of the experience of Mr. Joinet which led him to observe that, in relation to the broader legal profession, "it seems that the judiciary and lawyers are the

only professions to run serious risks" (E/CN.4/Sub.2/1992/25/Add.1, para. 6 (2)(e)). As a practical consequence, this means that the Special Rapporteur will address matters affecting principally judges and lawyers, whatever their official role in the judicial branch of government.

64. With regard to definitions, the Special Rapporteur will address himself to all cases, situations and matters involving performance of the functions of judges (whether in the superior or the subordinate courts, or in special tribunals created by statutes), jurors, assessors and lawyers, whether the persons involved are professional or lay, whether their functions or appointments are of regular standing or ad hoc, and irrespective of their formal qualifications or recognition.

65. In devising methods of work for implementing his mandate, the Special Rapporteur is conscious of the fact that his mandate was created in response to concrete and practical problems. In many countries, judges and lawyers suffer reprisals for performing their professional functions. Interferences range from professional sanctions and dismissals through arbitrary arrests and detentions to physical attacks including killings and disappearances. In addition to interferences with individual judges or lawyers, there have been many incidents where the executive or legislative branches have suspended certain functions of the judicial branch, or in some cases legislated them out of existence, i.e. there have been interferences with the structures and institutions which administer justice, including bar associations. The Special Rapporteur finds that the independence and impartiality of the judiciary can be effectively secured if there is in the State a well-entrenched independent mechanism, independent of the executive and legislative arms of government, responsible for the appointment, promotion, transfer, and dismissal of judges (as noted in Human Rights Committee General Comment 13). In addition, financial independence from the executive and legislative arms of government is vital for an independent and impartial system of justice. Consequently, the Special Rapporteur will inquire into the availability of such mechanisms in States Members of the United Nations.

66. The purpose of the present chapter is to outline how the Special Rapporteur intends to implement each aspect of his mandate in a practical way. The essential work of the mandate has been articulated in paragraph 3 of Commission resolution 1994/41. Implementation of the mandated tasks requires: (i) fair and reliable methods of investigation into allegations; (ii) reliable methods of assessing progress achieved in protecting and enhancing the independence of the judiciary, together with reliable methods of assessing specific needs in order to make appropriate and concrete recommendations leading to real improvements; and (iii) methods of identifying and examining matters of principle concerning the independence and impartiality of the judiciary and the independence of the legal profession.

67. As a general rule, the Special Rapporteur will make himself available on the widest basis to the greatest extent of his abilities. He will seek to establish, and has already taken steps in this direction, direct contacts with Governments, relevant domestic authorities, intergovernmental organizations, relevant professional organizations and institutions, other interested international and national non-governmental organizations, academic institutions and individuals.

68. As a second general rule, the Special Rapporteur's approach will emphasize the prevention of violations. Hence, the Special Rapporteur will encourage dissemination of the relevant standards and will respond promptly upon being informed of possible threats to judicial independence and the independence of the legal profession.

69. In relation to other thematic mechanisms, the Special Rapporteur wishes to express his intention to cooperate fully, for example through regular consultations, joint studies and joint missions when appropriate, as recommended in the Joint Declaration of the Independent Experts Responsible for the Special Procedures for the Protection of Human Rights (A/CONF.157/9) and in the report on the meeting of independent experts responsible for the special procedures held at Geneva from 30 May to 1 June 1994 (E/CN.4/1995/5).

B. Concerning alleged violations

70. Paragraph 3 (a) of Commission resolution 1994/41 establishes a mandate which is consistent with the other special thematic procedures. Hence, in his methodology the Special Rapporteur will draw upon the experience acquired by the various thematic mechanisms and will largely follow the established common practice. In particular, he takes note of the methods of work used by the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/1994/7, paras. 13-67) and the Special Rapporteur on torture (E/CN.4/1994/31, paras. 5-23).

71. The Special Rapporteur's mandate encompasses a broad range of issues relating to the protection of the independence of the judiciary and the legal profession. Since interferences with judicial independence may be directed against both individuals and the institutions or branch as such, the Special Rapporteur will have to consider general situations as well as concrete incidents and individual cases.

72. In relation to the legal profession, the Special Rapporteur is conscious of the fact that the role of lawyers and their respective bar associations in upholding human rights and fundamental freedoms, as referred to in paragraph 14 of the Basic Principles on the Role of Lawyers, is sometimes seen by Governments as lawyers dabbling in politics. The Special Rapporteur will be vigilant in the protection of this important role of lawyers in upholding these rights and freedoms and will seek to bring offending Governments to account; the Special Rapporteur is aware of instances where lawyers have been arbitrarily detained without trial and of some cases in which their law practices have been subjected to economic sanctions. However, the Special Rapporteur will be equally vigilant in scrutinizing situations where lawyers may be using their bar associations to indulge in partisan politics, thus compromising the independence of the legal profession. In this connection, the Special Rapporteur will seek to distinguish between engagement in the protection of those human rights which have political connotations, and engagement in politics per se.

73. In all cases, direct contacts with the alleged victims and/or their representatives will be sought. Corroborative or supplementary information will also be sought from sources other than the alleged victims or their representatives.

74. Where the information received by the Special Rapporteur is prima facie credible, the Special Rapporteur will transmit the allegation, usually by letter, to the concerned Government in order to obtain the Government's response.

75. The credibility of the source of the allegations will be established by the Special Rapporteur by reference to: the degree of detail presented by the alleged victim about him or herself and the event or interference alleged; corroborative sources; logic; the laws in force in the concerned State.

76. In rare cases of particularly grave allegations of violations, for example, threats to the life of the alleged victim, the Special Rapporteur will send an urgent appeal to the concerned Government. This method will follow the procedures established for other thematic mechanisms.

77. Whether addressed through a letter or through a cable issued as an urgent appeal, the Government concerned will be expected to respond expeditiously to the Special Rapporteur's request for information or explanation. In this regard, the Special Rapporteur draws attention to Commission resolution 1993/47, in which Governments are encouraged to so respond.

78. Paying due account to the need to have reliable information prior to seeking responses from concerned Governments, the Special Rapporteur will seek to act in the preventive spirit with which he will approach his mandate overall. By doing so, the Special Rapporteur would hope to avoid more serious interferences or attacks. For example, should the Special Rapporteur observe movement in some part of the world directed towards restriction of judicial independence or the independence of the legal profession, for example, consideration of legislation, he will endeavour immediately to inform decision-makers of the relevant international standards. Such endeavours may well require direct intervention at the local level in order to draw the attention of the relevant authorities to the specific standards prior to legislation being adopted or other violations occurring.

79. In such situations as may require, the Special Rapporteur will undertake on-site visits to enhance his understanding of particular situations and to facilitate personal contacts with the relevant parties, especially governmental authorities.

80. Where responses received from Governments are considered unsatisfactory by the Special Rapporteur, he will seek additional information from the source/victim and the Government. Still unsatisfactory governmental responses will be mentioned in the subsequent reports of the Special Rapporteur to the Commission on Human Rights. The cases/situations will also continue to be followed by the Special Rapporteur until such time as a satisfactory response is received. Satisfactory governmental replies will be deemed to have "clarified" allegations and such cases will not normally figure in the Special Rapporteur's reports.

81. Concerning the notion of a "satisfactory" response from a concerned Government, the Special Rapporteur wishes to make clear that responses must demonstrate respect for independence of the judiciary and the legal profession

in practice. The Special Rapporteur will not be satisfied with mere statements of principle extracted from the Constitution of the State concerned, but will seek further information on how in practice those principles are applied to secure judicial independence and impartiality and the independence of the legal profession.

82. In adopting the above-described methods in cases or situations arising under the terms of paragraph 3 (a) of Commission resolution 1994/41, the Special Rapporteur takes note of the fact that Mr. Joinet experienced and described the difficulties of endeavouring to consider allegations and government responses thereto through the normal procedures, in so far as translation and transmission of information and general communication between the sources, the Special Rapporteur, the Centre for Human Rights and the responsible Government are very time-consuming. The Special Rapporteur sincerely hopes that such difficulties can be overcome.

C. Concerning progress achieved and concrete recommendations

83. It is the obvious aim of international human rights law that standards be implemented at the domestic level. However, such implementation requires, in the first place, full knowledge of the existing standards on as wide a scale as possible. In this connection, the Special Rapporteur's initial experience supports Mr. Joinet's earlier finding that "non-governmental organizations, particularly professional organizations of jurists, are insufficiently well informed of the specific system of standards for the protection of the judiciary and lawyers" (E/CN.4/Sub.2/1992/25/Add.1, para. 6 (4) (b)). Consequently, significant promotional activities will be necessary to spur progress in implementation of the standards.

84. The promotion of respect for the independence and impartiality of the judiciary will be served by the Special Rapporteur's reporting on progress achieved throughout the world. Not only will positive steps be brought to light, but specific methods of implementation will no doubt provide the opportunity to learn: progress achieved in one part of the world may be useful in overcoming problems elsewhere in the world.

85. Progress will be evident not so much from the apparent absence of interferences and attacks as from positive measures of protection which engender a healthy and vigorous judiciary and legal profession confidently performing their functions. Legislative progress will be necessary in many parts of the world in order to overcome existing structural deficiencies. However, such legislative progress may be dependent upon success in promotional activities, as mentioned above. For example, before parliamentarians may be prepared to act to secure judicial independence and the independence of the legal profession through statutory measures, unjustified fears that an independent judiciary may usurp executive or legislative powers will have to be overcome.

86. In connection with the above, the Special Rapporteur is especially aware of the importance of encouraging and aiding countries in transition to democracy in order to establish a system that will provide a proper balance between the various authorities concerned with the administration of justice. At this moment of global change, the Special Rapporteur is convinced that the

most immediate and critical need for advisory services and technical assistance in the field of the administration of justice in general, and with regard to judicial independence and the independence of the legal profession in particular, is among countries in transition to democracy. Consequently, the Special Rapporteur will seek dialogue with the authorities of such States with a view to identifying specific needs and encouraging the provision of appropriate services and assistance.

87. The Special Rapporteur will also strongly encourage regional cooperation in order to strengthen the independence of the judiciary. In this connection, the Special Rapporteur welcomes several initiatives around the world. For example, the Special Rapporteur applauds the work being done in the countries of the former Soviet Union by European intergovernmental organizations such as the Council of Europe and the Organization of Security and Cooperation in Europe's Office of Democratic Institutions and Human Rights. Initiatives aimed at regional standard-setting, such as the draft additional protocol to the European Convention on Human Rights prepared by the Association of European Magistrates for Democracy and Freedoms and the Draft General Principles on the Independence of the Judiciary prepared by the association of Asian Chief Justices, are also to be applauded in so far as they are consistent with, or add to, universal standards. Certainly, it is to be acknowledged that initiatives by respected non-governmental organizations, such as the Geneva-based International Commission of Jurists' Centre for the Independence of Judges and Lawyers and the New York-based Lawyers Committee for Human Rights, have contributed greatly through their detailed reporting to the development of specific standards and methods of implementation aimed at securing the independence of judges and lawyers. In relation to such initiatives, the Special Rapporteur will, in addition to reporting upon them, seek to act as a catalyst and facilitator where his involvement may be considered welcome and constructive.

88. Returning to problems of structural deficiency, they will be examined initially through scrutiny of laws. More in-depth examination would require country visits for needs assessment. The Special Rapporteur would be available to undertake such visits at the request of Governments, but he may also approach Governments in that regard where he may think it would be of use. The Special Rapporteur may occasionally issue "country profiles" which would both reveal problem areas and identify governmental efforts which required support and encouragement. Involvement with multilateral institutions such as the World Bank may also be pursued, especially to encourage funding of infrastructural needs associated with the "capital costs" of the administration of justice under an independent and impartial judiciary.

89. Evidently, the effective implementation of paragraph 3 (b) of Commission resolution 1994/41, with special attention to its constructive emphasis, will require close cooperation with the advisory services and technical assistance programme of the Centre for Human Rights. To this end, the Special Rapporteur will pursue the establishment of a regular exchange of information and views with the Centre for Human Rights on matters concerning judicial independence and the independence of the legal profession.

90. Over the long run, increased awareness of the standards is the key to progress. It is partly with this in mind that the Special Rapporteur has

contacted not only the relevant professional associations, whose membership consists of those most immediately interested and affected, but also law schools and faculties, with a view to informing and acculturating future lawyers, judges and, frequently, political leaders. In relation to the latter group, the Special Rapporteur intends to follow up his initial contacts with a recommendation concerning the development of a specific programme for law schools.

D. Concerning questions of principle

91. With regard to that part of the mandate articulated in paragraph 3 (c) of Commission resolution 1994/41, i.e. questions of principle, Messrs. Joinet and Singhvi have already singled out some subjects to be taken up and the Special Rapporteur has already commented briefly upon some of these and others. It may well be that, in the course of his examination of various cases and situations around the world, other questions will arise. The Special Rapporteur will endeavour to analyse systematically such questions in his reports.

92. In addition to his own analyses, the Special Rapporteur may wish to solicit the views of Governments, specialized or interested organizations and independent experts. Wide consultation may take the form of participation in, or even the hosting of, occasional seminars and conferences. In general, the Special Rapporteur will stimulate discussion with a view to distilling consensus on possible standards.

93. In the process of conducting his studies, the Special Rapporteur may very well seek partners from the governmental, intergovernmental and non-governmental communities.

III. RESOURCE REQUIREMENTS

94. It should go without saying that the effective implementation of the Special Rapporteur's mandate depends upon the availability of adequate human and material resources. There is a direct causal link in this regard: adequate funding facilitates effective implementation, while inadequate funding will result in ineffective implementation. It is also to be observed that the availability of resources has a significant bearing on a second causal relationship: the achievement of an independent and impartial judiciary affects significantly the level of respect for human rights in general - as recognized by the Commission in the seventh preambular paragraph of resolution 1994/41. The causal chain continues in so far as the level of respect for human rights has a direct bearing upon the quality of democracy in a State. Taking this logic into account, the "value for money" quotient of support for the independence and impartiality of the judiciary is high; for example, it can contribute greatly to the avoidance of discrimination engendering group disaffections and rivalries giving rise to conflicts.

95. Clearly, the Special Rapporteur will require adequate resources in order to implement his mandate effectively. He hopes that the Member States will, through the relevant United Nations organs, ensure that such resources are made available. In this regard, the Special Rapporteur wishes to acknowledge the welcome intention of the High Commissioner for Human Rights to provide

each special rapporteur with modern means of communication and access to an electronic database of human rights information (see E/CN.4/1995/5/Add.1). It is hoped that Member States will support such concrete and useful initiatives.

96. The practical implication of unmet resource requirements is the inability of the Special Rapporteur to organize and carry out his mandate: he cannot plan missions, make decisions on how (and sometimes whether) to intervene, etc. A clearly identified budget is a necessary precondition to efficient and effective work. This is especially so in the case of emergency situations: the Special Rapporteur must have a clear understanding of the financial resources available to him and/or the permissible expenses he may incur so that he does not enter into undertakings which are unfeasible financially or cause him to expend unrecoverable sums from his personal resources. This is all the more important since the Special Rapporteur is not a United Nations employee, but contributes his work on a pro bono basis.

97. In order to enhance his effectiveness, and taking into account the well-known constraints on the financial resources of the Organization, it may be necessary for the Special Rapporteur to accept voluntary contributions or material assistance from organizations or persons interested in supporting the work of the mandate. However, in principle, the Special Rapporteur will not accept contributions from Governments because of the potential for conflict of interest in possible cases of allegations: the Special Rapporteur will vigorously maintain his independence both in fact and in appearance.

IV. CONCLUSIONS

98. It is worth repeating the observation made by Mr. Singhvi in his report of almost 10 years ago:

> "The contemporary international order is premised on the intrinsic and ultimate indivisibility of freedom, justice and peace. It is clear that in the world in which we live, there can be no peace without justice, there can be no justice without freedom and there can be no freedom without human rights." (E/CN.4/Sub.2/1985/18, para. 74)

99. Commission on Human Rights resolution 1994/41 not only confirms the above-noted general observation of Mr. Singhvi, but, following the end of the cold war, it also gives new meaning and impetus to another more precise observation of Mr. Singhvi:

> "The strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights and fundamental freedoms and for preventing the denial and miscarriage of justice. To strengthen human rights in the legal system and to build up the strength of the legal system and to sustain the rule of law and eliminate any denial of justice should be a major strategy for updating the premises of the new world order." (E/CN.4/Sub.2/1985/18, para. 44)

100. It is the Special Rapporteur's strongly held opinion that the measure of the strength of any legal system is to be found in the degree of independence and impartiality of its judiciary.

101. In order for the principles of judicial independence and the independence of the legal profession to obtain their broadest and deepest effects, it is necessary that the existing standards of judicial independence and the independence of the legal profession enjoy wide dissemination. Emphasis should be placed on achieving such dissemination not only through the efforts of the Special Rapporteur, but also through the publications and promotional activities of the Centre for Human Rights.

102. Implementation of the Special Rapporteur's mandate to monitor progress achieved and to make concrete recommendations, including the provision of advisory services and technical assistance, will require close cooperation with the advisory services and technical assistance programme of the Centre for Human Rights. At a minimum, the Special Rapporteur will have to be kept regularly informed by the Centre.

103. With attention to the practical details of effective implementation of the mandate, it is absolutely clear that the mandate will not be effective without the provision of adequate human and financial resources. There exist some minimum requirements in this regard. Specifically, the Special Rapporteur concludes that he requires the full-time assistance of at least one Professional staff member of the Centre for Human Rights at Geneva, together with the provision of secretarial services at his place of residence (Kuala Lumpur). In addition, the Special Rapporteur requires certainty with regard to the budgetary resources at his disposal, in order to plan his activities and travels.

104. Ultimately, effective implementation of the mandate depends upon the will of Member States with regard to their own domestic jurisdiction. Where problems exist, cooperation of the concerned Governments is fundamental. In seeking to resolve existing problems, constructive dialogue is essential and, therefore, will be the principal method employed by the Special Rapporteur.

V. RECOMMENDATIONS

105. In so far as this report is intended mainly to establish the terms of analysis and subsequent work of the Special Rapporteur in fulfilment of his mandate, he has no recommendations to make of a substantive nature. However, the Commission's adoption of the following recommendations may contribute to the better functioning of the mandate and would facilitate its effective implementation. Specifically, the Special Rapporteur recommends:

(a) That the Special Rapporteur be apprised on a regular basis of requests made for advisory services and technical assistance and of such services and assistance as are being provided through the Centre for Human Rights, or are foreseen, in the area of the administration of justice, in particular with regard to the independence and impartiality of the judiciary;

(b) That, with a view to achieving the widest dissemination of the principles of judicial independence and impartiality and the independence of the legal profession, the Centre for Human Rights publish a "fact sheet" on this subject.